No. 92-2037

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1992

RICHARD A. WOLFF and
MARGUERITE M. WOLFF,
Petitioners,

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA,
a Pennsylvania Corporation, and
JOHNSON & HIGGINS, a Foreign Corporation,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT JOHNSON & HIGGINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's decision in this case is in conflict with a decision of another United States court of appeals on the same matter.

2. Whether the Sixth Circuit's decision in this case is in conflict with a state court of last resort on an issue concerning a federal question.

3. Whether the Sixth Circuit has so far departed from the accepted and usual course of the judicial proceedings as to call for an exercise of this Court's power of supervision.

4. Whether the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

5. Whether Petitioners' Petition for Certiorari raises any issues of such importance as to require review by this Court.

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STATEMENT OF THE CASE

In this case, Petitioners, Richard A. Wolff and Marguerite Wolff, seek recovery under two insurance policies issued by Respondent Life Insurance Company of America ("LINA") as part of a comprehensive group employee benefits program provided by Respondent Johnson & Higgins ("J & H")[1], Petitioner Richard Wolff's former employer. The policies at issue are a personal accident insurance policy (No. ABL-61-36-06) and a business travel accident policy (No. OK-20-33). Each of the policies required that written proofs of loss had to be provided to LINA within ninety (90) days after the date of loss, and that no legal action could be brought more than three (3) years after the time written proofs of loss were required to be furnished.

While employed by J & H as a property loss consultant, Petitioner Richard Wolff suffered a closed head injury on March 18, 1980, during a business trip to Kentwood, Michigan. Before his first appointment of the day, Petitioner fell and struck his head while walking across the parking lot of a local restaurant. (R. 27, deposition of Richard Wolf, pp. 48-52.)

As a result of this injury, Petitioner began suffering headaches and memory loss. (R. 27, pp. 68-70.) Petitioner ultimately took an early retirement from J & H on September 5, 1980. (R. 27, p. 72.) As his condition deteriorated, he became eligible for long-term disability benefits under a LINA policy which was part of his benefits package, as well as social security disability benefits. (R. 27, pp. 72-73).

During this period, Petitioner received two letters from Elaine Justus of J & H. The first, dated August 28, 1980 (R. 31, attachment B; Petitioners' Appendix F) was essentially

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[1] Johnson & Higgins is not a subsidiary or affiliate of a publicly owned corporation, and, to J&H's best knowledge, there is no publicly owned corporation not a party to this action which has a financial interest in the outcome.

a form letter advising Petitioner that he may have a disability claim and should fill out the enclosed claim form and submit it to the insurance company. Petitioner did so and received those benefits (R. 27, pp. 109-110). The second, dated December 29, 1980 (R. 30 at tab 12; Petitioners' Appendix G), outlined benefits available to Petitioner as a retiree of J & H and referred him to his employee handbook. (R. 59) Petitioner admits to having this handbook in his possession prior to the accident giving rise to his disability (R. 27, pp. 43-44). However, his deposition testimony seems to indicate that he did not examine this handbook until December, 1988, and Mrs. Wolff confirms this. (R. 27, pp. 42-44; 76; R. 58, deposition of Marguerite Wolff, pp. 9-10). When Petitioners finally did review the employee handbook, they learned of the two policies at issue and submitted claims to LINA on January 10, 1989 (R. 27, pp. 83-85). It was the rejection of these claims by LINA which precipitated this suit.

Petitioners assert that no claim was made because they were not aware of the insurance coverage in question because of Plaintiff Richard Wolff's alleged mental incompetency.

Following the filing of motions for summary judgment and dismissal by LINA (R. 17; R. 25) and J & H (R. 18; R. 19; R. 20; R. 22; R. 23; R. 25), the case was assigned to Magistrate Marc L. Goldman. Specifically, the Magistrate found that "Plaintiffs' claims against J & H are predicated solely upon the contention that the company owed them a duty to timely file the necessary notices or proofs of loss on their behalf" (R. 38, p. 4; Petitioners' Appendix E, p. 20a) and concluded that "the Plaintiffs have failed to state a claim upon which relief may be granted against this Defendant [J & H]" (R. 38, p.5, Petitioners' Appendix E, p. 20a).

Following oral argument on November 19, 1991 (R. 50), the District Court entered an acceptance of the Report and Recommendation and a Judgment in favor of Defendants-

Respondents, LINA and J & H, on December 10, 1991 (R. 43; R. 44; Petitioners' Appendix D, p. 16a).

Petitioners subsequently appealed to the United States Court of Appeals for the Sixth Circuit. In a per curiam order issued March 23, 1993 (reproduced as Petitioners' Appendix B, p. 2a) the Sixth Circuit affirmed the District Court's order and judgment dismissing Petitioners' claims. Petitioners then filed a petition for rehearing, which was denied by the Sixth Circuit in an order issued April 16, 1993 (see Petitioners' Appendix A, p.1a). This petition for writ of certiorari followed.

ARGUMENT

I. Relevant Criteria for Issuance of Writ of Certiorari.

In their Petition for Writ of Certiorari, Petitioners present a lengthy statement of the case, which attempts to show that it would be unfair or inequitable to deny Petitioners a recovery on their claims in this case. Petitioners' statement of reasons why the Court should grant certiorari in this case is addressed primarily to the merits of the legal arguments rejected below.

However, neither the equities nor the legal merits of the case are relevant at this stage. Supreme Court Rule 10.1 summarizes the main factors the Court normally considers in reviewing petitions for writs of certiorari. This rule provides:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same

> matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Because, as shown below, Petitioners have satisfied none of the criteria for issuance of a writ of certiorari, Respondent J & H requests that their petition be denied.

II. The Sixth Circuit's Decision In This Case Is Not Directly in Conflict With a Decision of Another United States Court of Appeals on the Same Matter.

In their Petition for Writ of Certiorari, Petitioners maintain that, by ruling that their claims are barred by their failure to file a claim under the policies at issue for almost six years after the three-year contractual limitation period, the Sixth Circuit "improperly overruled" its own prior decision in *Norfolk & Western Railway Co.* v. *Auto Club Insurance Association*, 894 F.2d 838 (6th Cir. 1990). However, whether or not a United States Court of Appeals decision is inconsistent with another of its decisions is not relevant in considering

whether this Court should grant certiorari[2]. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957)("it is primarily the task of a Court of Appeals to reconcile its internal differences".)

As Supreme Court Rule 10.1 makes clear, the relevant inquiry is whether there is a clear conflict among different circuits on the same issue. Because Petitioners have neither alleged nor shown a clear conflict between the decision sought to be reviewed and any other decisions in any other United States courts of appeal on this same issue, it would not be appropriate to grant certiorari in this case.

Moreover, Petitioners' assertion that the Sixth Circuit's decision in this case "improperly overrules" its decision in *Norfolk & Western Railway Co.* v. *Auto Club Insurance Association* is untrue. In fact, *Norfolk & Western Railway Co.* is distinguishable in several important respects from the present case. In that case, the driver of an automobile drove his car into a moving Norfolk and Western ("N&W") train, destroying twenty-three railroad cars and several hundred yards of track. Five days later, N&W informed the driver's no fault automobile insurance carrier, Auto Club Insurance Association ("ACIA") that it was claiming property protection insurance benefits under the driver's policy. N&W informed ACIA that it would take a considerable period of time to determine the extent of its total losses due to the magnitude of the damages and because its railroad cars were being repaired at many different facilities. In October, 1986, N&W obtained complete information on its loss, and submitted documentation of its costs to ACIA. ACIA rejected N&W's claim as untimely.

In April, 1987, N&W filed an action for property insurance benefits under the no fault policy. In defense, ACIA

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[2] As Justice Harlan commended, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself". *Manning the Dikes*, 13 Record of NYC Bar Association, 541, 552 (1958).

asserted that N&W's claim was untimely under Mich. Comp. Laws Anno. 500.3145(2) (West 1983), which contained a one-year statute of limitations.

The District Court held that the statute had been tolled because N&W had given ACIA specific notice of its claim under the no fault policy. ACIA appealed.

The Court of Appeals for the Sixth Circuit affirmed, emphasizing several points. First, it held that the case was not governed by Mich. Comp. Laws Anno. 500.3145(1), which had been addressed by the Michigan Supreme Court in *Welton* v. *Carrier's Ins. Co.*, 421 Mich. 571, 365 N.W.2d 170 (1984), but by the second section of this Michigan automobile no-fault provision, § 500.3145(2). Second, the court also emphasized that N&W had exercised reasonable diligence in pursuing its claim, since it properly notified ACIA of its claim, identified the specific policy under which it was seeking recovery, and filed its claim shortly after receiving all of the information regarding the extent of its loss. Finally, the court noted that ACIA would not be prejudiced.

Both the facts and legal issues are very different in the present case. First, the holding in *Norfolk & Western Railway Co.* concerned the tolling of a specific one-year *statutory* limitation applicable solely to automotive insurance policies, contained in Mich. Comp. Laws No. 500.3145(2). In contrast, the present case involves a three-year *contractual* limitation contained in the policies at issue.

Second, in marked contrast to the plaintiff in *Norfolk & Western Railway Co.*, Petitioners did not pursue their claims diligently in the present case. Petitioners never notified J&H that they intended to seek recovery under the group personal injury or business travel accident policies within the limitation period, although they had all of the information needed to file timely claims under these policies. While the plaintiff in *Norfolk & Western Railway Co.* filed a claim only six months after the short statutorily mandated limitation

period, Petitioners waited nearly *nine years* after Mr. Wolff's injury before seeking recovery under the policies at issue.

Finally, while the court found no prejudice to ACIA in the *Norfolk & Western Railway Co.* case, the potential prejudice to J&H in the present case is obvious. In nine years, crucial information needed to defend a lawsuit may have been lost, witnesses' memories may have faded, or witnesses may have died or disappeared. In any event, because Appellants failed to raise the issue of prejudice in the District Court, they have waived this argument. See the Sixth Circuit's March 23, 1993 opinion, attached as Appendix B to Petitioners' Petition for Certiorari, at page 9a, and *Taft Broadcasting Co.* v. *United States*, 929 F.2d 240, 243-244 (6th Cir. 1991).

Thus, the Sixth Circuit's decision in this case is not inconsistent with either its own decision in *Norfolk & Western Railway Co.* or with Michigan law.

III. The Sixth Circuit's Decision Is Not In Conflict With A Decision of the Michigan Supreme Court Addressing a Federal Question.

Petitioners also allege that the Sixth Circuit's decision in this case is contrary to rulings by the Michigan Court of Appeals in *State Farm Mutual Automobile Insurance Co.* v. *Insurance Co. of North America*, 166 Mich. App. 133, 420 N.W.2d 130 (1988) and *Johnson* v. *State Farm Mutual Automobile Insurance Co.*, 183 Mich. App. 752, 455 N.W.2d 420 (1990). J&H denies that these decisions are either controlling or even directly on point. However, regardless of the applicability or merits of these decisions, they are merely rulings by lower level Michigan appellant panels on state law issues. As Supreme Court Rule 10.1 makes clear, the relevant inquiry in determining whether certiorari should be granted is whether a United States Court of Appeals has decided a *federal question* in a way which is in conflict with a state court of *last resort*. In 1980, when the Court restated

in Supreme Court Rule 17.1 the considerations governing review on certiorari, the Court pointedly omitted a long-standing provision (last articulated in the predecessor rule 19(1)(b)), that gave certiorari relevance to a Court of Appeals decision resolving "an important state or territorial question in a way in conflict with applicable state or territorial law." This omission reflects the Court's clear disinclination to review diversity cases where the only issue is the consistency of a Court of Appeals decision with applicable state substantive law. Therefore, because Petitioners have neither alleged nor shown that the Sixth Circuit's decision in this case is inconsistent with any decision of the Michigan Supreme Court involving a federal question, this Court should decline to grant certiorari here.

IV. The Sixth Circuit Has Not So Far Departed From the Accepted and Usual Course of Judicial Proceedings As to Call For An Exercise of This Court's Power of Supervision.

Supreme Court Rule 10.1 also provides that it may be appropriate to grant a writ of certiorari where a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." Petitioners have not alleged that there were any substantial irregularities in the judicial procedures employed by either the United States Magistrate, the District Court or the Court of Appeals in this case. Therefore, this factor would also fail to justify the grant of certiorari here.

V. The Sixth Circuit Has Not Decided An Important Question of Federal Law Which Has Not Been But Should Be Settled By This Court, or Decided A Federal Question In A Way That Conflicts With Applicable Decisions of This Court.

The sole federal question raised in Petitioners' Petition is their allegation that the District Court's dismissal of their

lawsuit was contrary to the "plain statutory language and stated congressional intent" of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.§10001 et seq. However, while ERISA is admittedly a federal statute, there is no federal issue which needs to be resolved. It is well established under numerous cases interpreting ERISA that J&H had no duty to conduct a search of its records to determine whether Mr. Wolff may have been covered under any additional policies other than those for which he filed timely claims. The Court of Appeals opinion in this case (attached as Appendix B to Petitioners' Petition) succinctly disposed of this issue as follows:

> Finally, appellants contend that, under the provisions of ERISA, J&H had a fiduciary duty to individually and personally advise appellants regarding available accident benefits, due to the nature of Mr. Wolff's injury.
>
> Under certain circumstances, an employer may be held to be an ERISA plan fiduciary. See e.g., *Moehle* v. *NL Industries, Inc.*, 646 F.Supp. 769 (E.D. Mo. 1986), aff'd without opinion, 845 F.2d 1027 (8th Cir. 1988). However, the fiduciary duties imposed on employers by ERISA under 29 U.S.C. §1104 are fulfilled by issuing a "non-technical," "easy to read" plan summary booklet. *Allen* v. *Atlantic Richfield Retirement Plan*, 480 F.Supp. 848, 851 (E.D. Pa. 1979) aff'd, without opinion, 633 F.2d 209 (3d Cir. 1980). Here, appellants concede that Mr. Wolff had just such a booklet in his possession prior to his accident. In fact, it was through this booklet, that plaintiff learned of his benefits. Thus, J&H did not breach their fiduciary duties.
>
> Furthermore, J&H had no involvement in the decision to deny appellants' claim and is, therefore, not a proper party to this suit for recovery of benefits under ERISA. See *Warren* v. *Oil, Chemical and Atomic Workers Union Industry Pension Fund*,

> 729 F.Supp. 563, 565-66 (E.D. Mich. 1989) (citing *Gelardi* v. *Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985)). Since J&H did not owe plaintiffs a duty to file their benefit claims, the court below corrected dismissed for failure to state a claim upon which relief may be granted.

See Appendix B to Petitioners' Petition for Certiorari, at pages 11a-12a.

Petitioners have not alleged or shown that any decisions of this Court are directly inconsistent with the decisions interpreting ERISA on which the Sixth Circuit relied. Thus, this case does not involve any important questions of federal law which would warrant this Court's review.

VI. Petitioners' Petition for Writ of Certiorari Raises No Issues of Such Importance As to Require Review By This Court.

The importance of the issues raised in a case is an important issue in determining whether a writ of certiorari should be granted. While there is no formula which reveals the precise amount of importance which will move the Court to grant certiorari, it is well established that the concept of importance relates to the importance of issues "to the public as distinguished from" importance to the individual parties involved. *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 70, 79 (1955). In the present case, the issues involved are clearly important to the Petitioners, but they have not alleged nor shown that the case involves issues of great importance to the public at large. This is because the District Court's dismissal of Petitioners' claims was based, in large part, on the specific facts of this case, which are unlikely to recur in other cases. In particular, the Circuit Court found that "Mr. Wolff's condition could not have prevented him from making an application for the benefits he now seeks, in light of the other actions he took in the relevant time period" (see Appendix B to Petitioners' Petition, at page 9a), and

that his failure to file claims under the policies at issue until nearly nine years after his injury was due to an oversight on his part. It is normally inappropriate to grant certiorari where, as here, review is sought of a lower court decision that turns on an analysis of the facts involved or upon the construction of particular contracts or written instruments. As the Court stated in *United States* v. *Johnson*, 268 U.S. 220, 227 (1925), "we do not grant a certiorari to review evidence and discuss specific facts." Also see *Texas* v. *Mead*, 465 U.S. 1041 (1984) (Stevens J.).

Thus, because the Sixth Circuit's decision in this case will not have an important impact upon the public at large, and turns on the unique facts involved in the case, the Court should deny Petitioners' request for issuance of a writ of certiorari.

CONCLUSION

In conclusion, the Sixth Circuit's decision in this case affirming the dismissal of Petitioners' claims was not inconsistent with previous decisions of the Sixth Circuit or with established Michigan law, and did not violate the Employment Retirement Income Security Act. However, regardless of the merits of Petitioners' legal arguments, they have not satisfied any of the normal criteria for issuance of a writ of certiorari. They have not shown that the Sixth Circuit's decision in this case is in conflict with a decision of another United States Court of Appeals on the same issue, or that the Sixth Circuit has decided a federal question in a way in conflict with the Michigan Supreme Court. Petitioners have not shown that the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, or that the Sixth Circuit has decided an important question of federal law which has not been, but should be settled by this Court.

Furthermore, they have not shown that the Sixth Circuit's decision conflicts with applicable decisions of this Court. Finally, Petitioners' own pleadings clearly show that the impact of this case is limited primarily to them, due to the unique facts involved in this case.

In sum, Petitioners have demonstrated no persuasive reason why the Court should grant their writ of certiorari and review this case on its merits. Accordingly, Respondent Johnson & Higgins requests that this Honorable Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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